FILED
MAY 26 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1766

IN THE

# Supreme Court of the United States

October Term, 1980

COLUMBUS AND SOUTHERN OHIO ELECTRIC COMPANY

*Appellant,*

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO

*Appellee.*

ON APPEAL FROM THE SUPREME COURT OF OHIO

## MOTION OF APPELLEE PUBLIC UTILITIES COMMISSION OF OHIO, TO DISMISS APPEAL, AND IN THE ALTERNATIVE, MOTION TO AFFIRM, AND BRIEF IN SUPPORT THEREOF AND IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

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## MOTION TO DISMISS, AND ALTERNATIVELY, MOTION TO AFFIRM

The Appellee, the Public Utilities Commission of Ohio hereby moves that this Court dismiss the Appeal of the Columbus and Southern Ohio Electric Company as improvidently taken from the Supreme Court of Ohio under 28 U.S.C. §1257(2). Alternatively, the Public

Utilities Commission of Ohio moves that this Court affirm the decision of the Supreme Court of Ohio rendered in the case below as being correct. A brief statement of the legal arguments in support of the motion to dismiss is contained in the section which follows. Arguments in support of the motion to affirm are discussed within the main body of this brief.

## ARGUMENT IN SUPPORT OF MOTION TO DISMISS

The Appellant has invoked the jurisdiction of this Court under 28 U.S.C. § 1257(2) which states in pertinent part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> * * *

By its express language, 28 U.S.C. § 1257(2) requires that the highest court of a state render a decision in favor of the validity of a statute before review can be sought in the Supreme Court of the United States. It is thus axiomatic that the statute in question must first be challenged at the state level. Where the State's highest court is not called upon to review a statute that is claimed to be in conflict with the United States Constitution or the treaties or laws of the United States, or where the state

court renders a decision which does not pass upon the validity of a statute, an appeal will not lie. *Kulko v. Superior Court of California*, 436 U.S. 84, 90 (1978); and see *Hanson v. Denckla*, 357 U.S. 235 (1958); *May v. Anderson*, 345 U.S. 528 (1953).

In the instant case, the Appellant, Columbus and Southern Ohio Electric Company (hereinafter "C&SOE" or "the Company"), did not challenge the validity of Ohio Revised Code Section 4905.22 (or any other statutory provision) in the proceedings before the Ohio Supreme Court. In fact, neither party even cited Ohio Revised Code Section 4905.22 in their briefs before the Ohio Supreme Court, although the Public Utilities Commission (hereinafter "the Commission") did make reference to the Company's obligation to serve its customers. C & SOE did cite Ohio Revised Code Section 4905.22 in its Motion for Rehearing before the Court, but here again the Company did not challenge or call upon the Ohio Supreme Court to decide the validity of the statute. Furthermore, C & SOE, in its Jurisdiction Statement filed on April 22, 1981, does not appear to be challenging the validity of Ohio Revised Code Section 4905.22 or any other statute before this Court. Rather, C & SOE continues to assail the decision of the Commission as it did in the proceedings below. Clearly, C & SOE's appeal pursuant to 28 U.S.C. §1257(2) is improper. *Kulko, supra; Hanson, supra; May, supra.*

The Commission recognizes that C & SOE's improper appeal does not preclude the Supreme Court from considering the Company's filings as a petition for a writ of certiorari. 28 U.S.C. §2103. Indeed, in the cases cited above just such a practice was followed. The Commission also recognizes that C & SOE's appeal, improvidently taken under 28 U.S.C. §1257(2), may be viewed as a petition for writ of certiorari under 28 U.S. C. §1257(3).

*Slagle v. Ohio*, 366 U.S. 259, 264 (1961). Nonetheless, the Commission urges that the Court, in exercising its judicial discretion, not grant C & SOE a writ of certiorari.

## STATEMENT OF THE CASE

The Appellee Commission will confine, as much as possible, its statement of the case to where it disagrees with the summary provided by C & SOE and to facts not contained within the Company's Jurisdictional Statement. It is correct to say that there is no disagreement as to the basic facts in this case; nevertheless, there is disagreement over the import of those facts and whether C & SOE is entitled to further compensation for its purchases of power.

C & SOE correctly notes that the source of the present controversy is an order of the Commission, dated February 14, 1978, issued subsequent to the Ohio Governor's declaration of a statewide energy emergency. While it is evident that one purpose of the Commission's order was to prevent severe curtailments of power, it was also the Commission's desire to preserve the reliability of the interconnected network of facilities among electric utilities. Here, the Commission's directive reflected the concern that the failure of one utility to maintain an adequate level of electrical generation could trigger a regional blackout adversely affecting even those utilities with sufficient coal supplies. In this respect, the Commission's order provided C & SOE with an unquantified benefit.

Neither the Governor's declaration nor the Commission's order was challenged in the state courts and the wisdom of these directives is not here at issue. Indeed, in its initial brief before the Ohio Supreme Court in the proceedings below C & SOE acknowledged that the

Commission's order of February 14, 1978, was a valid exercise of a legitimate police power.

The Commission would note that on March 6, 1978, C & SOE filed a proposal to impose mandatory 50% curtailments. This filing was indicative of the emergency conditions under which C & SOE then operated. To the extent that C & SOE's purchases of power enabled it to avoid having to impose mandatory curtailments on its customers, C & SOE benefited by having the ability to make sales and receive revenues. While C & SOE was, perhaps, not able to recover all the costs of purchased power, it did recover for those fixed costs reflected in its non-fuel rates — a recovery which would have been lost during periods of severe curtailment or blackout. Thus, while C & SOE cites the Commissions's directive as the basis for its argument that its property was "taken", there exists the real possibility that because of the Commission's directive a net benefit accrued to C & SOE.

C & SOE does not provide the Court with any indication whether or not it would have purchased power absent the Commission's directive to do so. Implicit in C & SOE's Jurisdictional Statement is the disturbing suggestion that given a choice between purchasing power and curtailing its customers C & SOE would have chosen curtailments. To suggest otherwise would mean that C & SOE would have purchased power on its own volition, and if that was the case, C & SOE can not justifiably argue that it was the Commission's order which deprived it of its property without due process.

C & SOE has stated that its request for compensation was denied in the Commission's opinion and order of December 12, 1979. As the Court will note in reviewing that lengthy opinion and order (C & SOE's App., pp. A10-A91), the subject request was only one element in a rate increase proceeding wherein the Commission

granted C & SOE an increase in permanent rates in the amount of $72 million, annually. That same opinion and order also confirmed the Commission's earlier grant to C & SOE of over $30 million in emergency rate relief for the year of 1979.* See C & SOE App., pp. 68, 69.

Since the Commission's decisions in both the emergency and permanent rate proceedings reflected an attempt to improve C & SOE's financial status and its position in the capital markets, there further exists the possibility that C & SOE has been indirectly compensated for its purchased power costs. However, no analysis has ever been done to measure the net benefit or detriment to C & SOE of the impact of the Commission's orders. For its part, C & SOE simply put in evidence in the permanent rate proceeding its request for a $6 million surcharge to the Commission; a request which the Staff of the Commission opposed as being inimical to the concept of setting future rates.

The Commission does not contest C & SOE's contentions that it and other utilities were struggling to maintain service during the coal strike emergency period. The utilities, however, were not alone in their efforts as the citizens of Ohio undertook significant conservation measures voluntarily and at the urging of state officials. And of course, the consumers of electricity from C & SOE paid an additional $13 million to the Company as a result of the power purchased pursuant to the Commission's order.

As a final point, the Commission would note its belief

* In its Opinion and Order of February 28, 1979, the Commission authorized C & SOE to collect $32,800,000 in additional revenues for the remainder of 1979 subject to certain refund provisions. On January 7, 1981, the Commission issued an opinion and order requiring a refund of $1,378,000.

that the amount in controversy has been altered by the merger of C & SOE into the American Electric Power Company as of May, 1980. See Jurisdictional Statement, fn 1. Because of its geographical location, it is highly probable that C & SOE purchased a portion of its power from or through other subsidiaries of the American Electric Power Company. To the extent that any portion of the $6 million in non-fuel charges accrued to those subsidiaries, which are now C & SOE's affiliates, C & SOE's claim for relief should be reduced.

## QUESTION PRESENTED

Does the Just Compensation Clause of the Fifth Amendment of the Constitution of the United States, as applied to the states under the Fourteenth Amendment, require that an electric utility recover the costs of energy purchased pursuant to an order of a state public utility commission acting under a valid exercise of the state's police power in order to avoid severe curtailments and maintain the interconnected network of facilities among electric utilities.

## ARGUMENT

The Commission has previously expressed its contention the C&SOE has improperly sought the avenue of an appeal to raise its issue before the Court. In the Commission's view, the appeal should be regarded as a petition for certiorari and the Court's discretion should be exercised accordingly. In that light, the Commission believes that the present matter is not suitable for judicial review. It has been stated that certiorari jurisdiction "is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." *Hamilton-Brown Shoe Co. v. Wolf Brothers and Co.*, 240 U.S. 251, 257-258 (1916).

The Commission believes that the present case is not "ripe" for this Court's review. As discussed previously, there exists several ways by which C & SOE has, in effect, recovered the dollars which it claims are at issue here. Principal among those is that, as noted by the Ohio Supreme Court in its decision, C & SOE received an unquantified benefit by virtue of the Commission's order.

C & SOE has attempted to magnify the impact of the decisions of the Commission and the Ohio Supreme Court into pronouncements of national importance. But in fact, those decisions dealt with a situation peculiar to Ohio at a particular point in time. Even C & SOE's ominous assertion that "public utility energy shortages will be an American way of life for the forseeable future" is not appropriate to its own situation. C & SOE has noted that over 90% of its generating capacity is coal fired, and the Commission believes that the Court can take judicial notice of the fact that C & SOE and its affiliates are located in a region of abundant coal reserves.

The Commission expects that the position of C & SOE will be echoed in the briefs *amicus curiae* which will be filed concurrent with this brief. Perhaps such briefs will refer to the current coal strike as a reason why the question raised is of national importance. Although this Commission concedes that Ohio may yet face an emergency similar to that which existed in 1978, it does not believe that the effects on Ohio's utilities will be the same. This is because the Federal Energy Regulatory Commission has moved to eliminate the high percentage "adders" previously charged on emergency energy transactions between electric utilities. It was these "adders" that in large part gave rise to the $6 million non-fuel costs claimed by C & SOE.

Though there are several reasons why the Court should

not exercise its discretion to hear this case, the Commission believes that if a writ of certiorari was granted the decision of the Ohio Supreme Court would be affirmed. The action of the Commission is simply not a taking without just compensation prohibited by the Fifth and Fourteenth Amendment to the United States Constitution.

The question of what constitutes a "taking" and what is "just compensation" under the Fifth and Fourteenth Amendments has proved to be a problem of considerable difficulty. It is certainly not the cut and dried analysis suggested by C & SOE in its Jurisdictional Statement. Indeed, no less an authority than this Court has stated that "no rigid rules" or "set formula" are available to determine where valid regulation ends and taking begins. *United States v. Coltex. Inc.*, 344 U.S. 149, 156 (1952); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962). And the Court itself referred to its review of cases claiming a "taking" under the Fifth Amendment as "essentially ad hoc, factual inquiries." *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

The Supreme Court has, however, noted several factors of significance. Among these factors are the economic regulation of the property holder and the extent to which regulation has interfered with investment-backed expectation. *Goldblatt v. Hempstead, supra* at 594. And the Court has more readily found a "taking" in those cases where there is a physical invasion of property than in those cases where there is an adjustment of economic benefits. *Penn Central Transp. Co. v. New York City, supra* at 124. Indeed, "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 413 (1922).

In its argument, C & SOE contends that its private

property was taken for public use without compensation. This Court has reviewed similar contentions and has found laws which in effect transfer economic benefits from one party to others valid. *Miller v. Schoene*, 276 U.S. 272 (1928); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915). In a number of these cases, the Court has had to consider questions of eminent domain and the "taking" of land and land rights by zoning. While the Court's holdings here have rested upon various factual differences, it is noteworthy that the Court has not found a "taking" even where there is an extreme diminution in property values because of the challenged law. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), (75% diminution); *Hadacheck v. Sebastian, supra* (87.5% diminution).

In a line of cases more parallel to the instant appeal, the Court has upheld regulations requiring railroads to separate grade crossings and bear the costs incident thereto. *Atchison, T. & S.F. Ry. v. Pub. Util. Comm.*, 346 U.S. 346 (1953); *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405 (1935); *Erie R.R. v. Pub. Util. Comm.*, 254 U.S. 394 (1929). In *New Orleans Public Service v. City of New Orleans*, 281 U.S. 682 (1930), the Court stated at p. 687, citing *Chicago, B. & Q.R. Co. v. Chicago, supra:*

> It is elementary that enforcement of uncompensated obedience to a regulation passed in the legitimate exertion of the police power is not a taking of property without due process of law.

In *New Orleans Public Service v. City of New Orleans*, the city required the removal of a viaduct and the installation of crossings. Reviewing the contention that the cost of removal constituted a taking, the Court stated:

> . . . the evidence fails to show that, having regard to the circumstances, it is so large that

> the regulation must be held to pass the limits of reasonable judgment and amount to an infringement of the right of ownership.

*New Orleans Public Service, supra,* represents the Court's more narrow view of the "taking" question. The broad view was expressed in *Erie R.R., supra,* where when confronted with the argument that a regulation might bankrupt the Erie, Justice Holmes stated:

> . . . that the States might be so foolish as to kill a goose that lays golden eggs for them, has no bearing on their constitutional rights. 254 U.S. at 410.

It is thus obvious that the question of "compensation" is intricately tied to the "taking" issue. In one instance, upon considering the "compensation" issue in terms of government price controls, the Court found that the regulated ceiling price constituted just compensation even though it was below the company's cost. *United States v. Commodities Trading Corp.,* 339 U.S. 121 (1950). Finally, it appears that the Court has taken a broad view as to what constitutes "just compensation". See *Penn Central Trnsp. Co. v. New York City, supra.* Compare majority and dissenting opinions.

C & SOE has placed particular emphasis on *City of Pittsburgh v. Pennsylvania Public Utility Commission,* 42 Pa. Commw. Ct. 242, 40 A.2d 672, 20 P.U.R. 4th 373 (1979), which deserves some discussion. In *City of Pittsburgh, supra,* an intermediate level appellate court affirmed an Order of the Pennsylvania Public Utility Commission entered March 2, 1978, which granted the request of the Duquesne Light Company for an emergency surcharge. Duquesne, in filing for the surcharge on February 6, 1978, claimed it was needed to enable the utility

to maintain proper service to the public. At hearings, Duquesne produced evidence demonstrating specific repercussions of the coal strike and the resultant need for emergency relief. From the Court's decision, it can be seen that the relief sought and granted was not designed to recover or reimburse Duquesne for the actual costs of purchased power. Rather, the emergency relief was intended to alleviate the specific critical financial condition faced by Duquesne at that time.

It appears the relief granted to Duquesne was akin to the emergency relief previously granted C & SOE. Thus, the Commission believes that the actions of the Pennsylvania Commission, as affirmed in *City of Pittsburgh*, *supra*, rather than supporting C & SOE's arguments, support the Commission's contention that the Appellant was in some part compensated for its emergency power purchases through the Commission's granting of over $30 million in emergency rate relief.

## CONCLUSION

Applying the holdings discussed above to the issues in the present case, it can be seen that the Commission's action in directing C & SOE to purchase emergency energy did not constitue a "taking" as that has been defined by the United States Supreme Court. Likewise, even if the Commission were deemed to have subjected C & SOE to a "taking" contrary to due process of law, C & SOE has recovered just compensation either through its continued abliity to make sales during the energy emergency, or through the emergency rate relief granted, or simply by its ability to recover two-thirds of its total purchased power costs through its fuel adjustment clause mechanism.

In summary, it is clear that the Commission's decision not to grant C & SOE a surcharge to recover $6 million was not in violation of the Fifth and Fourteenth Amendments to the United States Constitution. C & SOE's appeal, which must be regarded a petition for writ of certiorari, should be denied, or alternatively the Commission should be affirmed.

Respectfully submitted,

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Dated May 22, 1981

## CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Motion of Appellee Public Utilities Commission of Ohio to Dismiss Appeal, and in the Alternative, Motion to Affirm, and Brief in Support Therof and in Opposition to the Granting of a Writ of Certiorari to the Supreme Court of Ohio were sent by United States first class mail, postage prepaid, to counsel representing parties of record and *amicus curiae* in this proceeding this 22nd day of May, 1981.

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